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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 IN RE KOREAN RAMEN ANTITRUST
12 LITIGATION

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14 THIS DOCUMENT RELATES TO:
15 All Direct Purchaser Actions
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Case No. 3:13-cv-04115-WHO

**DEFENDANT SAMYANG FOODS CO.,
LTD.'S NOTICE OF MOTION AND
MOTION TO DISMISS THE
CONSOLIDATED DIRECT
PURCHASER PLAINTIFFS' CLASS
ACTION COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

[Proposed Order submitted herewith]

Date: October 1, 2014
Time: 2:00 p.m.
Location: Courtroom 2, 17th Floor

The Hon. William H. Orrick

Complaint Filed: March 24, 2014

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 1, 2014 at 2:00 p.m., or as soon thereafter as the matter may be heard, in the San Francisco Courthouse, Courtroom 2, 17th Floor, of the above-captioned Court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Samyang Foods Co., Ltd. ("SAMYANG Korea"), by and through its undersigned attorneys, will move the Court to dismiss the Consolidated Direct Purchaser Plaintiffs' Class Action Complaint ("DPC") in its entirety under Federal Rule of Civil Procedure 12(b)(6).

SAMYANG Korea's motion is supported by this Notice of Motion and Motion, the Memorandum of Points and Authorities ("the Memorandum"), the records on file in this action, and any oral argument that may be presented at the hearing on the motion. For the reasons provided in the Memorandum, SAMYANG Korea respectfully requests that the Court dismiss the DPC with prejudice because such claims fail to state a claim upon which relief can be granted.

Dated: June 9, 2014

MAYER BROWN LLP

By: /s/ Elizabeth Mann

Elizabeth Mann
Attorneys for Defendant
SAMYANG FOODS CO., LTD.

STATEMENT OF ISSUES TO BE DECIDED (Local Rule 7-4(a)(3))

1. Have the Direct Purchaser Plaintiffs stated a claim for a violation of Sections 1 and 3 the Sherman Act (15 U.S.C. §§ 1 and 3) against Samyang Foods Co., Ltd. (“SAMYANG Korea”) on behalf of a class consisting of all persons and entities who directly purchased Korean noodles in the United States and its territories where Plaintiffs (i) do not allege that any plaintiff purchased Korean noodles from Samyang Korea and, (ii) concede that Samyang Korea sells its Korean noodles in the United States to Sam Yang USA, Inc. (“Sam Yang USA”) pursuant to a long-term exclusive distribution agreement.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Samyang Foods Co., Ltd. (“SAMYANG KOREA”) brings this Motion to Dismiss the Consolidated Direct Purchaser Plaintiffs’ Class Action Complaint (“DPC”) because the Direct Purchaser Plaintiffs fail to plead, and cannot plead, that any plaintiff purchased Korean noodles *directly* from Samyang Korea. As such, Plaintiffs’ claims under Sections 1 and 3 of the Sherman Act (15 U.S.C. §§ 1 and 3) fail as a matter of law.

The Direct Purchaser Plaintiffs brought this action individually and on behalf of a putative class consisting of all persons and entities that directly purchased Korean noodles from Defendants in the United States and its territories from May 1, 2001 to December 31, 2010. The DPC generally alleges that the Defendants conspired to fix Korean noodle prices in Korea and that this conspiracy somehow impacted U.S. Korean noodle pricing. As explained in the companion Defendants’ Notice Of Motion And Motion To Dismiss The Indirect Purchaser Plaintiffs’ State Law Claims Under Fed. R. Civ. P. 12(b)(1) And 12(b)(6) [ECF. No. 80] and Defendants’ Notice Of Motion And Motion To Dismiss Direct Purchaser Plaintiffs’ And Indirect Purchaser Plaintiffs’ Class Action Complaints [ECF No. 83], each of these complaints should be dismissed because they fail to state a claim against any Defendant.

In addition, the DPC should be dismissed against Samyang Korea, with prejudice, because the DPC fails to allege any direct purchases from Samyang Korea and thus Plaintiffs’ claims fail as a matter of law. This fatal flaw cannot be corrected due to Plaintiffs’ admission that Samyang Korea has an exclusive distribution agreement with Sam Yang USA, Inc. (“Sam Yang USA”) pursuant to which Samyang Korea sells its Korean noodles to Sam Yang USA – not to Plaintiffs. Given that Plaintiffs have had two opportunities to plead these claims, the DPC should be dismissed with prejudice.

II. SUMMARY OF ALLEGATIONS CONCERNING SAMYANG KOREA

Plaintiffs admit that during the class period, Samyang Korea was “headquartered in Seongbuk-Gu, Seoul, Korea” and that Samyang Korea “directly shipped its Korean noodles” to Sam Yang USA in the United States. DPC ¶¶ 33, 182. Plaintiffs further admit that Samyang

1 Korea contracted with Sam Yang USA to act as its exclusive distributor of product in the U.S.
 2 Plaintiffs plead that Samyang Korea has a “long-term exclusive distributorship agreement” with
 3 Sam Yang USA as well as “agreements concerning trademarks, service marks, and intellectual
 4 property” with Sam Yang USA. *Id.* at ¶ 34.¹

5 One of the Direct Purchaser Plaintiffs, The Plaza Company, has acknowledged that
 6 Samyang Korea sells Korean noodles in the United States to Sam Yang USA to “ensure” that
 7 Samyang USA – not Plaintiffs – has a supply of Korean noodles. The Plaza Company originally
 8 filed its complaint in the Central District of California.² Sam Yang USA moved to dismiss that
 9 complaint, filing a Motion to Dismiss The Plaza Company’s First Amended Class Action
 10 Complaint and an accompanying Request for Judicial Notice.³ In its opposition to that motion,
 11 The Plaza Company acknowledged that the documents Sam Yang USA filed in support of its
 12 motion included a “Stock Sale and Purchase Agreement” which stated that Samyang Korea
 13 “shall enter into a long term exclusive distributorship contract with [Sam Yang USA] to ensure
 14 the supply of Seller’s [SAMYANG KOREA] products to the Company [Sam Yang USA].”⁴

15 Nowhere do the Direct Purchaser Plaintiffs allege that they purchased Korean noodles
 16 from Samyang Korea. DPC, *passim*. In a vain attempt to transform noodle purchases from Sam
 17 Yang USA to noodle purchases from Samyang Korea, the Direct Purchaser Plaintiffs cite to an
 18 entry on a third-party internet resource, yellowpages.com, that allegedly portrayed Sam Yang
 19 USA as a “part of Sam Yang Foods Co., LTD who manufactures soy sauce products, ice cream

20 ¹ The Indirect Plaintiffs also concede in the Consolidated Indirect Purchaser Plaintiffs’
 21 Consolidated Class Action Complaint (“IPC”) that Samyang Korea does not own or control Sam
 22 Yang USA. IPC at ¶ 148 (“During the Class Period, the Subsidiary/Affiliate Defendants, with
 23 the exception of Sam Yang (U.S.A.) Inc., were wholly owned and controlled by the Korean
 Defendants. . . .”).

24 ² *The Plaza Co. v. Nong Shim Co., Ltd. et al.*, Case No. 2:13-cv-05274-PA-RZ (Class Action
 Complaint For Damages And Injunctive Relief), ECF No. 1 (C.D. Cal.).

25 ³ *Id.* (Notice Of Motion And Motion To Dismiss Defendant Sam Yang (U.S.A.), Inc.;
 26 Memorandum Of Points And Authorities In Support Thereof; Declaration Of Edward W. Suh),
 ECF No. 59 (C.D. Cal.); *Id.* (Defendant Sam Yang (U.S.A.), Inc.’s Request For Judicial Notice
 In Support Of Pending Motions And Declaration Of Edward W. Suh), ECF No. 60 (C.D. Cal.).

27 ⁴ *Id.* (Plaintiff’s Memorandum Of Points And Authorities In Opposition To Defendant Sam Yang
 28 USA’s Motion To Dismiss), ECF No. 65, pp. 4, 6 (C.D. Cal) (emphasis added).

and fresh milk.”⁵ *Id.* at ¶ 34. Based on this hearsay report that concerns products that have nothing to do with this litigation (ice cream, milk and soy sauce), the Direct Purchaser Plaintiffs assert that Sam Yang USA is “under the direction and control” of Samyang Korea. *Id.* This conclusion is contrary to relevant facts that the Plaintiffs concede: that Samyang Korea ships Korean noodles to Sam Yang USA pursuant to a distribution agreement. What then occurs is that the Direct Purchaser Plaintiffs purchase Korean noodles from a U.S. reseller of those products, which could be Sam Yang USA, or which could be any other U.S. reseller. What is clear, however, is that the Direct Purchaser Plaintiffs have not alleged that they purchased any Korean noodles from Samyang Korea, and they cannot so allege.

III. LEGAL STANDARD

A complaint will survive a motion to dismiss if it contains “sufficient factual matter . . . to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While pled facts are accepted as true, a court need not accept the complaint’s “legal conclusion[s].” *Iqbal*, *supra*, 556 U.S. at 678. Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 951 n.5 (9th Cir. 2005). “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Iqbal*, *supra*, 556 U.S. at 679. Thus, a reviewing court may begin “by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Id.* Consistent with this analysis, courts routinely dismiss claims where the pled facts undermine the legal conclusions contained in a complaint. *See Weisbuch v. Cnty. of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) (dismissing complaint where pleaded facts established that plaintiff could not prevail on the claims pled in the complaint); *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1098 (9th Cir. 2004) (dismissing complaint with prejudice

⁵ For the Court’s information, the yellowpages.com listing for Sam Yang USA has been updated since the DPC was filed. The yellowpages.com entry for Sam Yang USA now states that “Sam Yang USA is a distribution company located in Santa Fe Springs, California. Sam Yang USA is privately owned and is unaffiliated with Samyang Foods Co., Ltd., a company based out of South Korea.” Description of Sam Yang, Inc., YELLOW PAGES, <http://www.yellowpages.com/santa-fe-springs-ca/mip/sam-yang-usa-inc-2533993> (last visited June 9, 2014).

1 where “Plaintiffs’ alleged facts effectively preclude a claim. . . .”).

2 **IV. PLAINTIFFS FAIL TO STATE A CLAIM AS A MATTER OF LAW**

3 Plaintiffs do not allege that any member of the Putative Direct Purchaser Class has
4 directly purchased Korean noodles from Samyang Korea. Plaintiffs attempt to obfuscate the fact
5 that they cannot allege direct purchases from Samyang Korea by boldly asserting that Sam Yang
6 USA is a “part of” and thus under the “control” of Samyang Korea (DPC ¶ 34) suggesting – but
7 not pleading – that Plaintiffs’ purchases from Sam Yang USA somehow amount to purchases
8 from Samyang Korea. Plaintiffs’ attempt to bridge this unbridgeable gap fails for two
9 independent reasons. First, Plaintiffs do not plead that when they purchase Korean noodles from
10 Sam Yang USA they purchase from Samyang Korea – nor could they do so given their
11 admission that Samyang Korea exclusively sells its Korean noodles to Sam Yang USA. Second,
12 Plaintiffs’ naked “control” allegation is a legal conclusion, which is not only unsupported by any
13 pled facts, it is also *contrary* to the pled facts. The “control” allegation should be disregarded.
14 *Wynn v. Nat’l Broad. Co., Inc.*, 234 F.Supp.2d 1067, 1101 (C.D. Cal. 2002) (“The Ninth Circuit
15 has previously held that . . . a plaintiff can ‘plead himself out of a claim by including
16 unnecessary details contrary to his claims.’”) (quoting *Sprewell v. Golden State Warriors*, 266
17 F.3d 979, 988 (9th Cir. 2001)).⁶

18 Further, the allegation that Sam Yang USA is “part of” and under the “control” of
19 Samyang Korea is based on a reference to an irrelevant internet posting that discusses soy sauce,
20 ice cream and milk. These legal conclusions, which are based on irrelevant hearsay and material
21 that contradicts pled facts, can be disregarded. *See, e.g., Crispin v. Christian Audigier, Inc.*, 717
22 F.Supp.2d 965, 976 n.19 (C.D. Cal. 2010) (noting that it was unfortunate that counsel cited to an
23 unreliable internet page and stating that citations to such internet sources undermine counsel’s
24

25 ⁶ *See also* Defendants’ Notice Of Motion And Motion To Dismiss Direct Purchaser Plaintiffs’
26 And Indirect Purchaser Plaintiffs’ Class Action Complaints (ECF No. 83 at 13-16) for a
27 comprehensive discussion of the legal aspects required to plead “control” and the fact that
28 Plaintiffs have failed to plead facts to support the legal conclusion that any Korean defendant
“controlled” a U.S. company such that the U.S. company became involved in the claimed U.S.
conspiracy.

1 reliability).⁷

2 It is black letter law that the Direct Purchaser Plaintiffs cannot plead a violation of the
 3 Sherman Act without pleading direct purchases from Samyang Korea. *Cal. v. ARC Am. Corp.*,
 4 490 U.S. 93, 100 (1989) (“Under federal law, no indirect purchaser is entitled to sue for damages
 5 for a Sherman Act violation. . . . Had these cases gone to trial and a Sherman Act violation been
 6 proved, only direct purchasers would have been entitled to damages for that violation. . . .”); *Del.*
 7 *Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1123-24 (9th Cir. 2008)
 8 (holding that an indirect purchaser plaintiff lacked standing for an alleged violation of federal
 9 antitrust laws); *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 749-50 (9th Cir. 2012) (holding
 10 that cardholders were indirect purchasers who did not have federal antitrust standing pursuant to
 11 the rule restricting federal antitrust standing to direct purchasers only).⁸

12 Therefore, the DPC and must be dismissed with prejudice. *Leadsinger, Inc. v. BMG*
 13 *Music Publ’g*, 512 F.2d 522, 532 (9th Cir. 2008) (stating that dismissal without leave to amend is
 14 proper where it is clear that the complaint “could not be saved by any amendment.”); *Cook,*
 15 *Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (stating
 16 the same).

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21 ⁷ Further, Plaintiffs have failed to plead any facts supporting the claim that Sam Yang USA
 22 (from whom they allege that they have purchased Korean noodles) took any act in furtherance of
 23 Plaintiffs’ hypothetical U.S. pricing conspiracy. Indeed, the DPC is devoid of any facts
 24 concerning whether any of the U.S. defendants communicated with any other U.S. defendant
 25 about anything related to Korean noodles sales. DPC, *passim*. Moreover, while the Plaintiffs
 26 allege that Sam Yang USA conveyed what plaintiffs call “false” information about the reasons
 for price increases in the U.S., Plaintiffs do not allege – presumably because they cannot – that
 Sam Yang USA had any knowledge that the information it was conveying to the public about its
 price increases was “false.” *Id.* at ¶ 34. Thus, Plaintiffs have failed to allege that they purchased
 Korean noodles from any Samyang company that was a member of the alleged conspiracy.

27 ⁸ See also ANTITRUST LAW DEVELOPMENTS, Volume I n.42 (6th ed. 2007) (citing *Kansas v.*
 28 *UtiliCorp United, Inc.*, 497 U.S. 199, 207 (1990); *Campos v. Ticketmaster*, 140 F.3d 1166, 1168-
 71 (8th Cir. 1998); ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS at 243-44 (2010)
 (citing *Howard Hess Dental Labs. v. Dentsply Int’l*, 602 F.3d 237 (3d Cir. 2010)).

1 **V. CONCLUSION**

2 Samyang Korea respectfully requests that the Court grant this motion and dismiss the
3 DPC against Samyang Korea with prejudice.

4 Dated: June 9, 2014

MAYER BROWN LLP

6 By: /s/ Elizabeth Mann
7 Elizabeth Mann
8 Attorneys for Defendant
9 SAMYANG FOODS CO., LTD.
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